IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL BNO.837 OF 2005

Shri Ananda Sakharam Mane
since deceased through L.Rs
1A Ratnaprabha anandrao Mane
1B Smt.Savita Vijay Mane
1C Ravindra Anandrao mane
1D Sou.Ranjana Shivaji Shinde ..Appellants
(Orig.Deft no.1)

V/s

1. Shri Mohan Pandurang Mane
since deceased through his LRs
1A Shevantabai Pandurang Mane
1B Smt.Hirabai Mohan Mane
1C Ankush Mohan Mane
1D Kajol Mohan Mane
1E Jagdish Mohan Mane
2. Shri Pandurang Tukaram mane
since deceased through his LRs
2A Smt.Shevantabai Pandurang Mane
2B Shri Bhaskar Pandurang Mane
2c Smt.Nirmala Bhau Mane
2D Ms Shilpa Bhau Mane
2E Jayshri @ Sangita V. Ghare

3. Smt. Janabai Bapu Veer

4. Shri Anandrao Shamrao Mane .. Respondents
(No.1 Orig.Plff
and Ors. Orig. Defts)

Shri Vijay Patil i/b V.Y.Jadhav for Appellants
Shri Rajesh Kachare with R.N.Kachare for Respondent nos.1A to 1E

CORAM:S.R.SATHE,J
DATED:20th March 2006

ORAL JUDGMENT :-

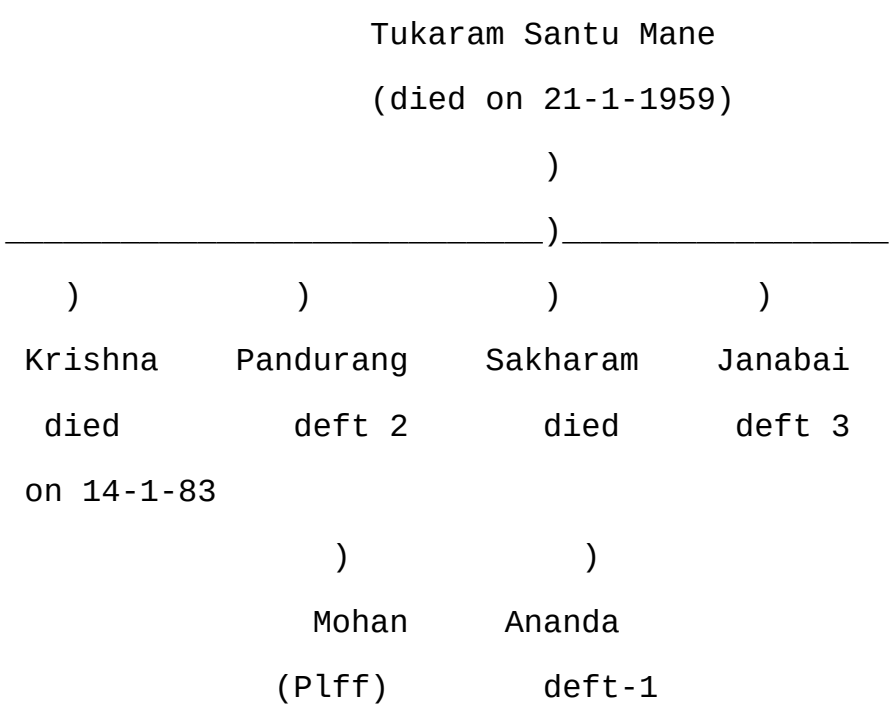
1. The Appellants legal representatives of original defendant no.1 in Regular Civil suit NO.163 of 1986 have preferred this Second Appeal against the judgment and order passed by the Court of 2nd Additional District Judge, Karad in Regular Civil Appeal No.212 of 2000, whereby decree for declaration and possession passed in favour of the plaintiff by the trial Court was confirmed and appeal was dismissed.

2. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendants.

. The brief facts giving rise to this appeal are as

under :

3. The plaintiff and defendants are close relatives of each other. In order to understand their relationship it would be worthwhile to reproduce the genealogy,



4. It is the case of plaintiff that suit property described in detail in para 1B of the plaint is the ancestral property of plaintiff's grand father (Tukaram Santu Mane). He had 3 sons viz. Krishna, Pandurang and Sakharam and daughter Janabai. Even during the life time of Tukaram plaintiff's father Pandurang and his 2 brothers started living separately and except properties mentioned in para 1B, the other properties were accordingly partitioned between themselves.

5. As the income of the joint family was very meagre and not sufficient to cater the needs of all the family members of the 3 brothers viz. Krishna, Pandurang and Sakharam, after attaining the age of majority they had left the village in search of their livelihood. The property mentioned in para 1B of the plaint was kept by them for maintenance of Tukaram and his married daughter Janabai as her husband died soon after her marriage and she returned to her maidan home and started residing with Tukaram. After attaining majority Krishna started serving in Indian Army. As he was not having any source of livelihood at village, the property mentioned in para 1A of the plaint was given to him by the Government and he had started cultivating the same. Other brothers were not having any right, title or interest in the said property. Krishna's wife died issueless. After her death Pandurang and his family members were looking after Krishna and as a result of the same Krishna had love and affection for Pandurang's family and in particular for plaintiff.

6. According to the plaintiff, on 13-6-1977 Tukaram executed a registered will in favour of the plaintiff and bequeathed the property described in para 1A of the plaint to him. It was also mentioned in the Will that after the death of Krishna the property of his share should also go to the plaintiff. Thus according to the

plaintiff after the death of Krishna on 19-1-1983 he (plaintiff) became the owner of the suit property by virtue of the Will dated 18-6-1977.

7. After the death of Sakharam, the defendant no.1 started managing the joint family property. However, as he was also not having the property except share described in para 1B of the plaint, he (defendant no.1) Ananda also jointed the Indian army. Subsequently he also received land from Government. However, after the death of Krishna the defendant no.1 joined hands with Talahti and other revenue officers and got his name entered in respect of the properties held by Krishna i.e. the property described in para 1B of the plaint. However, when plaintiff opposed the said mutation entry the revenue authorities ultimately held that defendant nos.1 and 2 are also having share not only in the property 1B but also in the property 1A. Hence plaintiff filed the present suit for a declaration that the suit property described in para 1A of the plaint is exclusively owned by him and by way of consequential relief asked for possession of the same. Similarly,he asked for partition and separate possession of his 5/16th share in the suit property described in para 1B of the plaint.

8. The defendant nos 1 and 3 filed their written statement at Exh.23 and opposed the suit on several

grounds. Firstly, they contended that plaintiff has filed the suit in collusion with defendant no.2. They admitted relationship disclosed by the plaintiff in the plaint and the fact that Krishna had joined Indian army and was provided the suit property mentioned in para 1A of the plaint. They however, contended that the suit property was treated as joint family property and all the members of the family were taking income out of the same and Krishna alone was never in possession of the said land. The defendant further contended that late Krishna was not having any special love and affection for the plaintiff. However, taking advantage of the fact that Krishna was residing in plaintiff's house the alleged will was got executed by the plaintiff and others by virtue of misrepresentation and undue influence and as such the plaintiff is not entitled to get any right in the said property on the basis of the said Will. The defendants also contended that plaintiff has deliberately not included the other joint family properties in the present suit for partition and the suit is bad for non inclusion of all joint family properties. According to the defendants the suit was also barred by law of limitation. Hence on all these grounds the defendants prayed for dismissal of the suit.

9. On these pleadings the learned trial Judge framed issues at Exh.26. In order to prove the suit claim plaintiff examined himself at Exh.72 and 4 other

witnesses including attesting witnesses of the will. The defendants did not adduce any oral evidence. After considering the evidence adduced by both the parties the learned trial Judge came to the conclusion that only the suit property described in para 1B of the plaint is the joint family property which is liable for partition. The trial Court also held that the plaintiff has proved the will in question and he has become the owner of the suit property described in para 1A of the plaint and has also received share of Krishna in the suit property mentioned in para 1B. The trial Court denied the contention that the suit is barred by law of limitation and is bad for not including other joint family properties. Naturally he decreed the suit in plaintiff's favour.

10. Being aggrieved by the above mentioned order the legal representatives of the original defendant no.1 filed Regular Civil Appeal No.212 of 2000 in the Court of the Additional District Judge, Karad. After hearing the arguments advanced by both the learned advocates the first Appellate Court came to the conclusion that the decree passed by the trial court is legal and correct. He, therefore, dismissed the appeal.

11. The above mentioned order of dismissal of the appeal is challenged by the heirs of original defendant no.1 in this second appeal.

12. Shri Vijay Patil, learned Advocate for the Appellant has urged only two points before me. Firstly,he submitted that the learned trial Judge has wrongly held that will in question is duly proved by the plaintiff. According to him both the attesting witnesses had not at all proved the will and the lower Court was wrong in applying the provisions of Section 71 of Indian Evidence Act. Secondly, he canvassed before me that the learned trial Judge ought to have held that even the property mentioned in para 1A of the plaint was treated as joint family property by late Krishna. In order to prove this he also submitted that it is necessary to permit the Appellant to lead additional oral and documentary evidence in this behalf. He also submitted that it is necessary to carry out amendment in the written statement as the plaintiff had given a statement before the Circle Officer, Dhebewadi to enter the names of the plaintiff and defendant nos.1 and 2 to the property owned by Krishna and Krishna had in fact treated all properties as joint family properties and there was blending of the joint family property and property acquired by deceased Krishna.

13. As against this Shri Kachare, learned Advocate for the plaintiff supported the judgment and order passed by the courts below.

14. The only substantial question of law involved in this matter is whether the courts below committed error in holding that the Will in question is duly proved by the plaintiff by relying on Section 71 of Indian Evidence Act when both the attesting witnesses to the Will had not proved the Will in question.

15. The relationship between the parties is not disputed. It is also admitted that suit property described in para 1B of the plaint is the joint family property of plaintiff and defendant while the property described in para 1A of the plaint was received by late Krishna from Government as he was serving in Indian army.

16. Plaintiff Mohan Mane has stated in his deposition Exh.72 that after the death of Krishna's wife he was looked after by plaintiff's family as late Krishna had no issue. He has further stated that Krishna executed a registered will in his favour and at the time of execution of the said Will he (plaintiff) his father, late Krishna and attesting witness Dhondiba Mane, Bandu Mane, Ramchandra Mane and Talathi of village were present. He has also stated that the said will is written by scribe Salvekar and Krishna has put his thumb impression on the same in the presence of the witnesses. In order to prove the said will he has examined the attesting witnesses to the Will viz. Bandu Mane Exh.89

and Ramchandra Pandurang Mane at Exh.90 and both these witnesses have not specifically stated that they signed the said Will in presence of Krishna and Krishna signed the same in their presence. In fact at one point witness Bandu Mane Exh.89 has even stated that he was told that document of sale deed was executed. So, the learned Advocate for the defendant strenuously argued before me that evidence of these two attesting witnesses is not useful to the plaintiff and it cannot be held that the plaintiff has proved the will in question. According to him there is no proper compliance of Section 63 of the Indian Succession Act 1925 and as such the will is not proved. In order to find out whether there is any substance in this argument, let us first see what Section 63 of Indian Succession Act 1925 says. It runs as follows :-

> 63. Execution of unprivileged Wills - Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules :-
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by

his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

17. It must be noted that as both these witnesses did not support the plaintiff the same were declared hostile and permission to put questions in the nature of cross examination was granted. However, if we peruse the statement of attesting witness Bandu Mane Exh.89, we

find that he has clearly admitted that will in question is signed by him. Not only that but he has even admitted the signature of second attesting witness Ramchandra Mane. the only thing is that he has stated that Krishna did not affix his thumb impression in his presence and other attesting witness has not signed in his presence. He has further admitted that he never signs any document without knowing the contents of the same. Even then he has denied that he has signed the will as attesting witness to the will. So, it is very clear that the said witness has been won over by the defendant. The same is the case in respect of other witness viz. Ramchandra Mane Exh.90.

18. From the perusal of the statement of the above witnesses it is very clear that they are deliberately deposing falsely. They could not give any satisfactory explanation as to why and under which circumstances they put their signatures on the will in question.

19. The learned Advocate for the defendants has drawn my attention to a case of Janki Narayan Bhoir V/s Narayan Namdeo Kadam AIR 2003 SC 761 to show that attestation of a will must be proved as required by section 63(c) of Indian Succession Act and Section 71 of Evidence Act is only in the nature of safe guard to mandatory provisions of Section 68 of evidence Act and to meet a situation where it is not possible to prove

the execution of the Will by examine attesting witness alive. It would be worthwhile to see what Sections 68 and 71 of Indian Evidence Act say.

> 68. Proof of execution of document required by law to be attested - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.
>
> 71. Proof when attesting witness denies the execution - If the attesting witness denies or does not recollect the execution

> of the document, its execution may be proved by other evidence.

. From the bear reading of the above Sections it is very clear that Section 71 is permissive and an enabling Section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling Section. It lays down the necessary requirement, which the Court has to observe before holding that a document is proved. In the above cited ruling only one witness was examined and he failed to prove the Will under Section 68 of the Evidence Act. Even then the other attesting witness to the will though available was not examined. So, under such peculiar circumstances it was held that provisions of Section 68 of Indian Evidence have not been complied with and so the Court cannot rely on the provisions of Section 71 of the Indian Evidence Act. It is only when the document is not proved as mandatorily required under Section 68 of the Evidence Act, the provisions of Section 71 of Evidence Act come into picture. In the instant case it is very clear that in order to prove the will in question the plaintiff examined 2 attesting witnesses. However, they turned hostile and did not support the case of plaintiff. The third attesting witness was not alive. So, it is under these circumstances the Court relied on the provisions of Section 71 of Indian Evidence Act which in my opinion, is perfectly

justifiable.

20. It has come on record that will in question is registered, Plaintiff's witness Narayan Jadhav Exh.79, Talathi of village has clearly stated that he was present at the time of execution of the said will and when that it was tendered to the Registrar. Not only that but he has also stated that before making necessary endorsement the Registrar had asked Krishna about the will and he had admitted that he executed the will in favour of Mohan i.e. plaintiff. There is endorsement to that effect in the will. So, having regard to the fact that two attesting witnesses had admitted their signatures on the will and they could not give proper explanation as to why they signed the will and considering the fact that will was executed in the presence of Krishna and in presence of witness Narayan Jadhav and plaintiff, both the Courts below rightly held that will in question is duly proved by the plaintiff. Incidently, it must be noted here that there is not only evidence on record regarding execution of the will but there is evidence to show that the said will is acted upon. The said will was relied upon by the plaintiff even before the tenancy authorities. So, it is not the case that the plaintiff came out with the will in question, when he filed the suit. So, considering all these aspects I am inclined to hold that the plaintiff has proved the will in question.

21. It was tried to be argued on behalf of the defendant that it is necessary to permit the defendant to lead additional evidence. In fact for that purpose the defendant has filed separate application. It appears that by virtue of the additional evidence defendant wants to take on record the extract of mutation entry no.68 and statement of plaintiff recorded at the time of said mutation. However, at the outset it must be mentioned that defendants have not at all given any satisfactory explanation as to why these public documents were not produced before the trial Court, particularly when it is not the case of the defendants that they were not aware of the said entry. On the contrary it is their say that they had in fact obtained the said extract and given the same to their Advocate but Advocate did not produce the same. there is absolutely no evidence to show that these extracts were obtained by the defendants during pendency of the suit and the same were handed over to their Advocate. It seems that defendants have tried to blame the Advocate to seek sympathy. They have not issued any notice to their Advocate nor filed the affidavit of the said Advocate. what is more to be noted is that they have not even shown that the said extracts were obtained by them during pendency of the suit. The extracts which are produced by the defendants in this Court are not at all true copies or certified copies of the relevant

documents. So, under such circumstances I have absolutely no hesitation to hold that the defendants have utterly failed to make out any case for permitting them to adduce additional evidence in this Second Appeal.

22. A feeble attempt has been made on behalf of the defendants to show that it is necessary to carry out amendment in the written statement. By virtue of proposed amendment the defendants want to take contention that even Krishna had treated the property described in para 1A of the plaint as a joint family property and that there was blending. It must be noted that similar contentions were also taken by the defendants and the learned trial Judge has even considered the case of blending. So, with a view to protract the matter or to get the matter remanded by hook or crook the defendants have filed two applications - one for additional evidence and second for amendment but defendants have failed to make out any good case for grant of said applications and hence the same are rejected.

23. It is pertinent to note that even the defendant has admitted that Krishna had received property described in para 1A of the plaint from the Government as Krishna had rendered service to Indian army,. When such is the position merely because at some point of time the said

property was being cultivated also by the above members of the joint Family or that income of the said property was utilised on occasion for the other members, one cannot jump to the conclusion that late Krishna had given up his rights as exclusive owner of the said property and that he had put the said property in common stock. Clause 227 of Hindu Law says :

> "Property which was originally the separate or self acquired property of a member of a joint family may, by operation of the doctrine of blending, became joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established, and it will not be inferred from the mere fact of his allowing the other members of the family to use it cojointly with himself nor from the fact that the income of the separate property was used to support a son nor from the mere failure of a member to keep separate accounts of his earnings. So also acts of geneosity of kindness should not be construed as admissions of legal obligations".

24. So, in the absence of any specific evidence on behalf of the defendants to show that this property was put in common hotch pot, both the Courts below have rightly held that defendants have failed to prove their contention in this behalf. Though it was contended that other joint family properties have not been included in the suit and as such suit for partition is not maintainable. The defendants failed to adduce any evidence worththename to support the said contention. Moreover, this point has not been pressed before me by the learned Advocate for the defendants.

25. In view of above, it is very clear that findings recorded by both the Courts below are legal and correct. There is absolutely no reason to interfere with the same. Hence the appeal is dismissed with costs.

26. The learned Advocate for the Appellant submits that execution and operation of this order be stayed for further period of 8 weeks as the Appellant desires to challenge this order before the Apex Court. The learned Advocate for the Respondents opposed and submitted that the matter is very old one and suit is filed in the year 1986, so, almost 20 years have lapsed and as such stay should not be granted. In the interest of justice the execution of this order is stayed for a period of four weeks from today.

(S.R.SATHE,J.)